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PETITION FOR WRIT OF CERTIORARI AND BRIEF.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. [redacted] 92

MURRAY HUMPHREYS

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES P. R. MACAULAY,
Attorney for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Murray Humphreys, respectfully represents that he duly filed his petition before the United States Board of Appeals for a re-determination of a deficiency in his income tax payments for the years 1930, 1931 and 1932 claimed by the respondent, the Commissioner of Internal

Revenue; that the Board rendered its decision against the petitioner and found that deficiencies were due from him, as claimed by the said respondent (R. 345); that your petitioner duly appealed to the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code; that on January 28, 1942 the Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals (R. 415); that your petitioner duly filed his petition for rehearing and that the Circuit Court of Appeals on February 18, 1942 entered an order that said petition for rehearing be denied (R. 416).

The jurisdiction of this Court to review the said judgment of the Circuit Court of Appeals is invoked under Section 240 of the Judicial Code, as amended, and under Section 641 of Title 26 of the United States Code.

A copy of the opinion of the Circuit Court of Appeals is printed in full on pages 410 to 414 of the record. The opinion of the Board of Tax Appeals is printed on pages 345 to 373 of the record.

Statement of the Matter Involved.

The petitioner did not keep books and he made income tax returns on the basis of expenditures (R. 47, 48).

Issues were made by the pleadings as to whether the petitioner had failed to pay income tax which had accrued within a specified period. The respondent claimed (1) that the petitioner under the name of M. L. Brunswick maintained an account in the Sears Community Bank in Chicago and that he had deposited large sums in said account; (2) that the petitioner during the year 1930 received $10,000 from a group of cleaners and dyers; (3) that in 1931 and

1932 the petitioner received $7,800 from a concern called the Drexel Cleaners (R. 34, par. 19; page 36, par. 40); (4) that in 1931 the petitioner paid $5,000 to the New Drexel Cleaners (R. 23, par. 23).

It was claimed by the respondent that the petitioner did not include in his tax returns the income represented by said deposits, receipts and investment.

The petitioner (1) denied having any interest in the Brunswick account (R. 51); (2) he denied receiving $10,000 from the group of cleaners and dyers, but admitted receiving $5,000 from them and he averred that he had included said income of $5,000 in his tax return (R. 18, par. 10); (3) he admitted receiving the sum of $7,800 from the Drexel Cleaners, but averred that he included said amount in his tax return (R. 19, pars. 11 and 12); he denied paying $5,000 to the Drexel Cleaners, but averred that 50 shares of stock in said company had been given to him (R. 19). The petitioner testified under oath in support of his said allegations and he was not contradicted. There was no substantial evidence introduced to support the claims of the respondent. The respondent relied on argument rather than on proof and based his case chiefly on the testimony of a police officer to the effect that the petitioner's general reputation in the community in 1930 and 1931 was that of a gangster and a racketeer (R. 284). The court below held that the fact that the petitioner was regarded as a gangster and racketeer was a controlling fact (Opinion, R. 411).

It was also alleged by the respondent that in December, 1931, a man named Fitchie was kidnapped; that in January, 1932, $50,000 was paid to the petitioner for his release and that the petitioner had not paid tax on said income (R. 25, pars. 40, 41, 42). The petitioner denied the

kidnapping of Fitchie and denied receiving said money (R. 31, pars. 40, 41, 42). As to this item there was some conflict in the evidence. The respondent produced a witness named Sumner, who testified that $50,000 was left on the seat of an automobile and that he saw the petitioner take the money from the car (R. 194, 197). The petitioner testified that he knew nothing about the kidnapping of Fitchie and that he had never been to the place where the car was parked (R. 302). There was much evidence tending to prove that the testimony of Sumner was false and that the testimony of the petitioner was true, but the issue was found against the petitioner.

The expense of the operation of the petitioner's automobile in his business amounted to $951 for the year 1932 and the depreciation in that year was $1,595. The petitioner in his tax return claimed credit for the said items. The respondent alleged that the said auto expense was false and fraudulent and was reported by the petitioner in his income tax return for the year 1932 for the purpose of creating a fraudulent deduction with intent to evade tax (R. 37, par. 43). The respondent never claimed that the petitioner used the car in any unlawful business nor that the petitioner had no lawful business (R. 33-38). The theory of the respondent appears to have been that a person who evades the payment of income tax must pay the full amount with penalties and forfeits any right to make any deductions for expenses. Since there was no issue made as to whether the petitioner had any lawful business, no evidence as to such matter was introduced. Nevertheless the Board of Tax Appeals disallowed the deductions on the ground that the petitioner was not engaged in any lawful business within the meaning of the statute and the Circuit Court of Appeals sustained the action of the Board (R. 414).

At the hearing before the Board of Tax Appeals considerable evidence was introduced tending to prove that the Brunswick account in the Sears Community Bank was opened by and belonged to a man known as "Lefty" Leventhal, who also did business under the name of M. L. Brunswick (R. 169, 170, 94, 251, 343, etc.). Notwithstanding the testimony of the petitioner that he was not the man who opened the Brunswick account and his testimony that he had no interest in said account, the respondent did not call Leventhal as a witness. But the Board of Tax Appeals said, in the opinion which it rendered after the hearing, that the most logical way of establishing Leventhal's exact status or connection with the Brunswick operations would have been to have called him to the witness stand (R. 367). The petitioner filed his petition for rehearing and made a motion for leave to call Leventhal to the witness stand, but the Board denied the motion (R. 385—the denial of the motion is shown by an order signed by the member and written at the top of the motion). The Circuit Court of Appeals sustained the action of the Board of Tax Appeals in denying said motion (R. 414).

The errors intended to be urged are that the court below erred in affirming the decision of the Board of Tax Appeals; that the judgment was not supported by the evidence; that the court erred in holding that the following findings of the Board of Tax Appeals were supported by the evidence: (a) that the petitioner was the owner of the M. L. Brunswick account; (b) that Fitchie was kidnapped; (c) that the petitioner received any money for the release of Fitchie; (d) that the petitioner received ten thousand dollars, the amount paid to Dr. Ginsberg by certain cleaners and dyers; (e) that the petitioner did not include in his tax return the receipt by him of five thousand dollars from Dr. Ginsberg; (f) the petitioner was

liable for taxes on the sums of twenty-six hundred dollars and fifty-two hundred dollars, which he received from the New Drexel Cleaners as salary for the years 1931 and 1932, though said income was included by him in tax returns for said years; (g) that the petitioner was not entitled to deductions on account of automobile expenses; (h) that the motion by the petitioner for leave to present the testimony of Leventhal was properly denied.

Questions Presented.

The questions presented are whether evidence claimed by the respondent to prove that your petitioner was regarded as a gangster and racketeer was properly considered by the court to be a controlling fact in this case (R. 411, 413); whether the petitioner was the owner of an account maintained in the name of M. L. Brunswick, in the Sears Community Bank in Chicago (R. 330), and liable for income tax on money deposited in said account (R. 35, par. 25; page 46, par. 41; page 41, par. 25; page 43, par. 41); whether the petitioner received in the year 1930 from a group of cleaners and dyers (Klever Shampay Cleaners and Dyers, *et al.*), the sum of $10,000 and failed to report said income (R. 34; pars. 11 and 12) or whether the petitioner only received $5,000 of said sum (R. 55) and included said sum of $5,000, which he recevied, in his reported income (R. 48, page 29, pars. 11 and 12); whether the petitioner included in his tax return the sum of $7,800, which he admitted receiving (R. 50, 51); whether the petitioner paid $5,000 to the Drexel Cleaners, or whether 50 shares of stock in said company were given to him (R. 19, 301); whether the petitioner received $50,000 ransom money (R. 301-2); whether the petitioner should have been allowed a deduction for expense of operation of his automobile and for depreciation in the year 1932 (R. 37); and whether he should have been allowed to present

Leventhal as a witness after the decision of the case by the Board of Tax Appeals (R. 385).

Reasons for Allowance of Writ.

As reasons relied on for the allowance of the writ the petitioner submits that the evidence introduced for the purpose of branding your petitioner as a gangster and racketeer should have been disregarded by the court below and should not have been deemed to be a controlling fact in the case (R. 411); that it appears that issues were decided against the petitioner in spite of uncontradicted evidence as a result of the court permitting itself to be influenced by the evidence reflecting upon the character of the petitioner; that though the evidence in regard to the petitioner being implicated in the alleged kidnapping of Fitchie and in regard to whether ransom money was paid to the petitioner was conflicting, it is to be feared that the court in passing upon the weight of the conflicting testimony was influenced by the said evidence.

It is submitted that the decision below should be reviewed for the reason that it is erroneous and not in accord with the principles of applicable decisions of this Court. Though circumstantial evidence was relied on by the Commissioner of Internal Revenue to prove that the petitioner received and had not paid tax on various alleged items of income, the circumstances were not proved, but were themselves presumed by the Court below contrary to the decision of this Court in *Chicago, Milwaukee & St. Paul Railway Co.* v. *Coogan*, 271 U. S. 472, 477.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court

to certify and to send to this Court for its review and determination a transcript of the record and proceedings herein; and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MURRAY HUMPHRIES,
Petitioner,

CHARLES P. R. MACAULAY,
Attorney for Petitioner.

BRIEF FOR PETITIONER.

May it Please the Court:

A concise statement of the case and a statement of the grounds on which the jurisdiction of this court is invoked have already been made in the petition for writ of certiorari and reference thereto is respectfully made.

The opinion of the Circuit Court of Appeals has been published in Volume 125 Federal Reporter, Second Series, page 340.

ARGUMENT.

There was no substantial evidence to sustain any of the findings of the Board of Tax Appeals, except possibly the finding that the petitioner obtained $50,000 ransom money in connection with the kidnapping of Fitchie (R. 195, 196). As to all other items of alleged income the testimony of the petitioner and other witnesses stood uncontradicted and the respondent was unable to prove any of his contentions, but was obliged to rely upon suspicions and groundless insinuations to the effect that the petitioner had possibly not paid all income tax due from him.

The record shows that a police officer testified that, "Murray Humphreys' general reputation in the community here in 1930 and 1931 was that of a gangster and a racketeer; he still has that reputation" (R. 284). Whether petitioner was a gangster, or not, could have no bearing on such questions as whether he was the owner of a particular account in a bank, etc. There was no jury present and it might be presumed that the admission of such irrelevant evidence would not affect the Court and would, therefore, do no harm. But the Circuit Court of Appeals,

upon the authority of *Capone* v. *United States,* 51 F. (2d) 609, held that the evidence was competent (R. 413) and even that it was controlling (R. 411). If the court was in error in this regard, it follows that due consideration was not given to the evidence. The respondent, aided by presumptions based upon the evidence that the petitioner was a gangster, was able to overcome sworn testimony favoring the petitioner, so that it was useless for the petitioner to contest the claims of the respondent at all.

It is submitted that the Circuit Court of Appeals misapprehended the purport of the decision in *Capone* v. *United States,* 51 F. (2) 609. In that case the defendant, Capone, offered to compromise his liability for not paying taxes by paying to the government a less sum than was due. He professed to be unable to pay anything more than he offered. The court said (page 619, bottom of first column):

> "Appellant stated in his offer of compromise and in his various efforts to secure a settlement of the taxes due the government for a sum less than the full amount that he was a professional gambler whose property had all been lost; that his only assets were a couple of broken-down race horses, and that he was not able to train them for races wherein he might recoup his fortune. He also stated that he had to borrow the $1,000 with which to make the offer in compromise. To disprove these facts, to show that the accused made false and fraudulent representations and to show that his failure to pay his taxes was willful, it was permissible for the government to show that appellant's principal business was trafficking in beer; that the proceeds from the beer business in five or six years exceeded a million and a half dollars, and that at all times he had to his credit, under fictitious names, in various banks, sums far in excess of the amount required to pay his taxes. That such evidence was

> damaging and prejudicial may be conceded, but such fact affords no grounds for its exclusion. It was relevant to the issues presented by the indictments upon which the accused was tried."

In that case the government had to prove that the defendant wilfully refused to pay taxes due from him and had fraudulently misrepresented his ability to pay and to that end the government proved that the defendant had the means to pay what he owed. In the case at bar, the respondent sought to prove that the petitioner had not paid taxes in full upon his income, because having the reputation of being a gangster there was a presumtion that he had a much larger income than he professed to have. There is no legal presumption that gangsters enjoy enormous incomes and seek to avoid paying taxes in full. The conclusions drawn by the court that the petitioner had not paid the taxes due from him in full are based on presumptions improperly drawn from the evidence that the petitioner had the reputation of being a gangster. Such conclusions, being based upon presumptions on presumptions, are not legitimate.

> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed."
>
> *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U. S. 472, 477.

The respondent did not claim in his pleadings that the petitioner did not have any lawful business or that he was not entitled to a business expense deduction on his automobile (R. 37). The absence of any evidence of the various legitimate enterprises in which the petitioner was engaged, did not warrant a refusal to allow him any business expense deductions.

It is further submitted that the burden was on the respondent to disprove the evidence introduced by the petitioner that he had no interest in the Brunswick account and that any presumption that might arise from the failure of respondent to call Leventhal, should be indulged in favor of the petitioner. Since, however, the Board of Tax Appeals declared, in effect, that the failure of the petitioner to produce Leventhal as a witness worked to the disadvantage of the petitioner, it is submitted that it was the duty of the Board to permit the petitioner to produce Leventhal as a witness and that the Circuit Court of Appeals erred in not holding that the Board committed error in denying the motion by the petitioner for leave to call Leventhal.

It is submitted, therefore, that the writ of certiorari should issue for the review of the judgment of the Circuit Court of Appeals.

Respectfully submitted,

CHARLES P. R. MACAULAY,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 92

MURRAY HUMPHREYS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 345–373) is reported in 42 B. T. A. 857. The opinion of the Circuit Court of Appeals (R. 410–414) is reported in 125 F. (2d) 340.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1942 (R. 415), and a petition for rehearing denied on February 18,

1942 (R. 416). The petition for a writ of certiorari was filed on May 18, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the decision of the Board of Tax Appeals that the petitioner received certain items of unreported income is supported by substantial evidence; and whether that evidence supports the imposition of the penalties involved.

2. Whether deductions claimed for automobile expenses were properly disallowed for lack of proof that they were in fact incurred; or if incurred, whether they were in any event ordinary and necessary expenses in carrying on a legitimate trade or business.

3. Whether there was any error in receiving and considering evidence that the taxpayer was regarded as a racketeer and gangster.

4. Whether, after rendering its decision, the Board erred in denying the taxpayer's motion for leave to present additional testimony.

STATUTES INVOLVED

The statutes involved herein are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

This case involves income taxes for the years 1930, 1931, and 1932. The facts, as found by the Board of Tax Appeals (R. 346–351), may be summarized as follows:

The taxpayer, a native of Chicago, in 1928 and 1929, together with others, was engaged in selling beer and had a one-fourth interest in, and managed, a restaurant where beer and liquor were sold. This business terminated in 1929 (R. 346–347). In 1930 and 1931 the taxpayer had some connection with the General Market House, from which he received $1,500 and $1,300 in those years. The record does not disclose the nature of this connection or of any services rendered (R. 347).

After a meeting in 1929, attended by representatives of various cleaning and dyeing establishments in Chicago, the taxpayer in 1930 received $10,000 by weekly contributions for furnishing protection from molestation to such establishments (R. 347–348). One such establishment which discontinued its payments in 1930 received threats from one of the taxpayer's associates; its plant was thereafter broken into and clothing damaged by acid or some chemical to the extent of $20,000. The other cleaners increased their payments so that the taxpayer received the full amount agreed upon (R. 348).

In 1931 the taxpayer was gratuitously made a part owner of the New Drexel Cleaners (R. 348–

349). That partnership interest was worth $5,000 (R. 360). In addition he received weekly payments totaling $2,600 in 1931 and $5,200 in 1932 (R. 349).

During the years involved the taxpayer maintained a bank account at the Sears Community State Bank, in the name of M. L. Brunswick, in which there were deposits of $29,812.82 in 1931 and $52,776.81 in 1932, of which $480 and $2,662.52 represented returned checks redeposited in 1931 and 1932, respectively.

In 1931 one Robert G. Fitchie, president of the Milk Wagon Drivers Union, was kidnapped in Chicago. He was released upon the payment of $50,000 ransom, which was left in an automobile and taken by the taxpayer on December 23, 1931 (R. 349).

The taxpayer never filed any income-tax return prior to 1932. After employing an accountant he filed a 1931 return on March 15, 1932, and also filed a return for 1930 and prior years on April 5, 1932 (R. 349). These were based upon figures obtained from cancelled checks, bank records, some of which were in fictitious names, and monies expended during those years (R. 349–350). The Board found that the 1930 return was not filed within the required time and that it was not shown that the delay was due to reasonable cause and not due to wilful neglect [1] (R. 350–351). The tax-

[1] See Sec. 291 of Revenue Act of 1928 (Appendix, *infra*, pp. 13–14).

payer's 1932 return was prepared by a different accountant from information furnished by the taxpayer. On this return a deduction was claimed for "Business Auto Expense" in the amount of $2,526 (R. 350). On the 1928 and 1929 returns the taxpayer stated his occupation or business as "Restaurant" (R. 349). For 1930 it was stated as "Inspector"; for 1931, "Superintendent"; and for 1932, "Executive" (R. 350). These returns reported incomes of $10,360, $25,380, and $20,800 for the years 1930, 1931, and 1932, respectively (R. 322–323, 350–352). In June 1933 the taxpayer was indicted on, and entered an unconditional plea of guilty to charges of wilfully attempting to evade income taxes upon incomes of $20,360 for 1930, $88,712.82 for 1931, and $60,489.50 for 1932, which included all the items mentioned above which are involved in this proceeding. The Board found that the deficiencies herein are due to fraud with intent to evade tax[2] (R. 351).

The principal issues before the Board were whether petitioner in fact had received the various items detailed above and whether they constituted unreported income. The Board found that petitioner had received the amounts in controversy and that they constituted unreported income; in particular, it found that he owned the Brunswick

[2] See Sec. 293 (b) of Revenue Act of 1932 (Appendix, *infra*, p. 14).

bank account, that the amounts deposited therein were income to him, and that he had received the $50,000 ransom (R. 358–372). It further held that the alleged automobile expenses which were based upon the taxpayer's estimate were correctly disallowed for lack of substantiation, and that it was not shown that they were incurred in any legitimate business (R. 372). The Board also sustained the 25-percent delinquency and 50-percent fraud penalties (R. 372–373). The Board's findings and opinion were filed on October 8, 1940 (R. 345). A motion for rehearing and motion for leave to present additional testimony were filed on November 7, 1940 (R. 379–387), and denied on December 18, 1940 (R. 3). On January 27, 1941, the Board entered its decision with respect to the deficiencies and penalties involved herein (R. 387), and its decision was affirmed by the court below (R. 410–414).

ARGUMENT

I

This case presents neither a conflict of decisions nor any question of general importance. The main question is simply whether the findings of the Board are properly supported by the record.

The evidence in support of the deficiencies and penalties sustained by the Board is fully summarized in the Board's findings of fact and opinion (R. 346–373). Such evidence was care-

fully reviewed by the court below, which stated (R. 414):

> We have, however, considered the evidence and experience no difficulty in determining that there was substantial evidence to sustain the Board's findings.

The decision is in accord with *Helvering* v. *Kehoe,* 309 U. S. 277. The record shows that the taxpayer and his associates received the $10,000 in 1930 for furnishing "protection" or on account of his influence with the unions (R. 51–53, 87, 96–97, 102). It was permissible for the Board to find from this evidence that the taxpayer was the principal in the transaction and received the entire amount, although he claimed to have received only $5,000 from those who acted as his intermediaries in collecting the money. The Board was entitled to draw its own conclusions as to petitioner's credibility.

The taxpayer admitted that he received an interest in the Drexel Cleaners, which was valued at $5,000 (R. 51–54, 57–58), in addition to $5,000 in cash (R. 125, 139, 257, 313). The evidence also fully sustains the conclusion that the taxpayer owned the "M. L. Brunswick" bank account in which income was deposited in 1931 and 1932 (R. 94, 107–109, 112, 330–339, 343); the signatures in that account had a strong similarity to the taxpayer's signatures (R. 343), and checks on this account were used for payment of a Lincoln car

for Mary Humphreys (R. 155–158). Although it is true that there was a conflict in the testimony as to the ownership of this account, there were presented to the Board sharp issues of credibility, and petitioner's principal witness in this connection had previously made flatly contradictory statements on this very question.

The evidence also shows that the taxpayer received the $50,000 ransom. The record shows that there was a kidnapping of a union official, at the point of a gun, who was released only after demands for, and the payment of, $50,000 in $100 bills, which the evidence shows was received by the taxpayer accompanied by other persons (R. 183–187, 192–197, 203–207, 316, 370). This item also was included in the indictment to which the taxpayer pleaded guilty (R. 79, 168–169, 225–227). He testified that he knew he was charged with this ransom in connection with publicity regarding the indictment (R. 308).

II

The disallowance of the alleged business expenses for gasoline, oil, garage, and service, and depreciation of a 16-cylinder Cadillac automobile (R. 50) was proper because the taxpayer did not establish that he was engaged in any legitimate trade or business. Moreover, the amounts claimed were not substantiated (R. 372). Section 23 (a) (Appendix, *infra,* p. 13) has been held inappli-

cable to activities which are contrary to public policy. *Chicago, R. I. & P. Ry. Co.* v. *Commissioner,* 47 F. (2d) 990 (C. C. A. 7th), certiorari denied, 284 U. S. 618. Cf. *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, 337–339. The taxpayer testified that he did not have much of any business (R. 47), and that he did not know anything about the dry-cleaning business and took no part in its management (R. 58). He stated that his 1932 income was not from a business but from a salary, in connection with which he used his Cadillac automobile every day (R. 50). However, the only use of an automobile in securing any of the income in question, as shown by the record, was with respect to the trailing of the witness Sumner and securing of the $50,000 ransom (R. 193–197, 203–207).

III

There likewise is no error in connection with the admission or consideration of evidence that the taxpayer was regarded as a gangster and racketeer (Pet. 6–7; Br. 9). The taxpayer claimed that he was furnishing protection to an industry in "turmoil" with a "cleaning war" (R. 52–53, 56, 67–68). He stated that Oslan had been "one of the antagonizers in the industry" (R. 53), in which other associates died violent deaths (R. 54). He admitted that he was "hanging around * * * and they were selling beer" in 1928 (R. 66). He

stated on redirect examination that he had been indicted on a charge of conspiring to restrain trade (R. 83); and, on recross-examination, that he used to talk to Al Capone and that there was a friendly feeling with the Capone organization (R. 87). When a fugitive from justice, in connection with the tax-evasion indictment, the taxpayer sent word by Frank Nitti, who was connected with the "old Capone syndicate," that he wanted to surrender (R. 163). His own attorney, during cross-examination of the witness Sumner, brought out that "racketeering is an octopus" (R. 200, 214) and a reference to the taxpayer and others as "birds" or "racketeers" (R. 215). He also developed that the taxpayer and another individual "got a flock of guns" (R. 285). His cross-examination of the witness John H. Lyle also brought forth testimony regarding efforts to drive out "gangsters" and "hoodlums" like Mr. Humphreys (R. 315, 320, 321). The taxpayer admittedly carried a gun at one time (R. 307). His own brother stated that the taxpayer's name became so notorious that the brother changed his name (R. 253).

The evidence with respect to the taxpayer's activities and reputation during the taxable years obviously had a direct bearing upon whether or not he was engaged in any legitimate business, and the questions of receipt of unreported income and deductibility of the alleged business expenses. In

view of all the foregoing evidence the testimony of the police officer, John I. Howe, that the taxpayer's general reputation was that of a gangster and racketeer (R. 284), could not have been prejudicial. The record shows that the taxpayer came fully within the modern definitions of these terms.[3]

IV

There was no error in denying the taxpayer's motion for leave to present additional testimony. As shown by the Statement, *supra*, p. 6, the motion was filed some time after the Board's findings and opinion were entered. The taxpayer then apparently sought an opportunity to produce and have one Leventhal testify regarding the M. L. Brunswick bank account (R. 114, 385–386). The record shows that as early as January 22, 1937, the taxpayer knew of the Commissioner's position with respect to this account, when he denied that it represented his income (R. 7, 19). There was some evidence that Leventhal owned, or had an interest in, this account (R. 114). The record also shows that Leventhal had been available at Chicago some three weeks before the hearing but had left and gone to Florida. The hearing extended

[3] See Webster, New International Dictionary (2d ed.), and Funk & Wagnalls New Standard Dictionary (1937), "racketeer" and "gangster." Funk & Wagnalls states that a racketeer is one who engages in bootlegging, beer-running, or other illegal occupations; one who terrorizes legitimate business by threat or violence to obtain control or to collect graft.

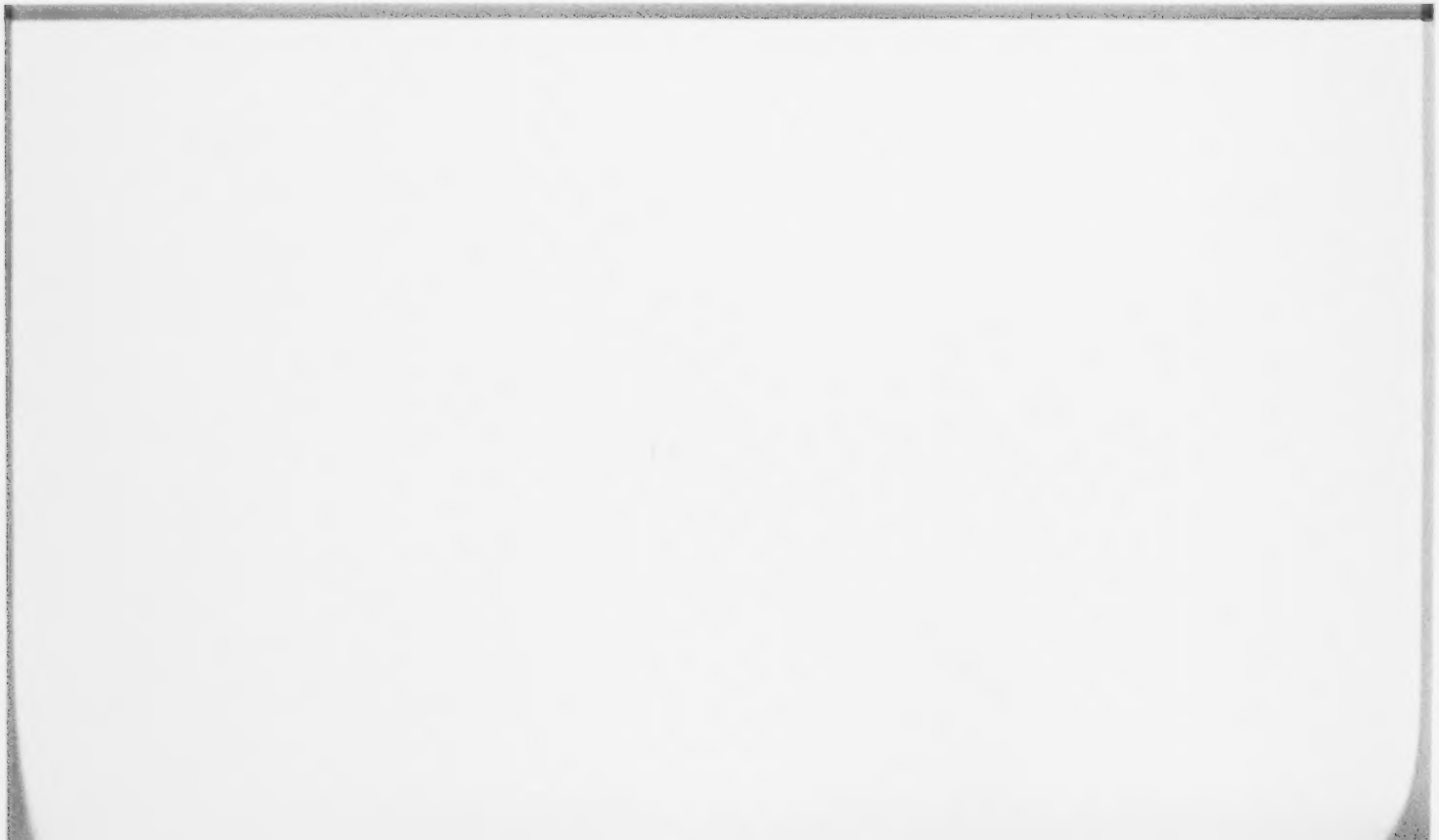
from January 17 to January 24, 1939 (R. 2), and there apparently was no attempt to secure Leventhal as a witness after the hearing started. The taxpayer, apparently for his own reasons, failed to take any steps to call Leventhal until the case had been heard and decided against him. The Board did not abuse its discretion in refusing to reopen the case in these circumstances.

CONCLUSION

The decision below is correct. There is presented neither an important question of law nor a conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
EARL C. CROUTER,
Special Assistants to the Attorney General.

JUNE 1942.



APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

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SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

* * * * *

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file

it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. * * *

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SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

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(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

The corresponding provisions of the Revenue Act of 1932, c. 209, 47 Stat. 169, are to the same effect.

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